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AUTHOR Frels, Kelly
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ABSTRACT

Punitive damages have been permitted in certain cases to deter wrongdoers from similar conduct in the future. The Supreme Court decision in the case of "Smith vs. Wade" set the standard for the award of punitive damages by permitting punitive award on varying standards of negligence, gross negligence, recklessness, or other culpable conduct short of actual malicious intent. Numerous federal courts have addressed the applicability of "Smith v. Wade" in civil rights cases. Examination of a number of circuit court decisions shows affirmation of punitive damage awards on varying standards ranging from mere willfulness to gross recklessness. The substantive tort laws of the states will influence the application of the "Smith v. Wade" standard in each circuit. Should the application become significantly conflicting, some future Supreme Court might examine the subject again. (MLF)

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Punitive Damages in Civil Rights Actions

Kelly Frels

The Purpose of Punitive Damages

Punitive damages have been permitted in cases to deter wrongdoers from similar conduct in the future.[1] The focus of punitive damages is on the character of the tortfeasor's conduct, and the issue is whether it is of the sort that calls for deterrence and punishment over and above that provided by the award of compensatory damages.[2] The same rationale has been applied in the award of punitive damages in civil rights actions.[3]

Governmental Entities and Punitive Damages

In *City of Newport v. Fact Concerts, Inc.*[4] the Supreme Court determined that punitive damages were not available under 42 U.S.C. section 1983 against a municipality, political subdivision or officials sued in their official capacities. The lower courts have uniformly agreed,[5] except when the unavailability of punitive damages against governmental entities has not been properly plead as an affirmative defense.[6] In *Barnett v. Housing Authority of Atlanta,*[7] a case tried six months after *City of Newport,* the Eleventh Circuit found that the defendant had improperly objected to punitive damages and had waived the defense. In *City of Newport* the punitive damages was raised in the motion for new trial while in *Barnett* punitive damages was first raised in the motion for judgment notwithstanding the verdict. Another distinguishing factor was the ab-

1. Restatement (Second) of Torts § 908(1) (1977).

2. Smith v. Wade, 461 U.S. 30, 54 (1983); *accord* Stokes v. Delcambre, 710 F.2d 1120, 1126 (5th Cir. 1983).

3. Wells v. Hico Indep. School Dist., 736 F.2d 243 (5th Cir. 1984) (deter or punish intentional violations of constitutional rights); Goodwin v. Circuit Ct. of St. Louis County, 729 F.2d 541 (8th Cir 1984) (deter future conduct in violation of civil rights).

4. 453 U.S. 247 (1981).

5. *See, In re* Selcraig, 705 F.2d 789, 797 n.11 (5th Cir. 1983) and Holly v. City of Naperville, 571 F. Supp. 668 (N.D. Ill. 1983).

6. Barnett v. Housing Authority of Atlanta, 707 F.2d 1571, 1579-80 (11th Cir. 1983).

7. *Id.*

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sence of proof that the judgment would be paid from public funds since the Atlanta Housing Authority was a quasi public body.[8]

Individuals and Punitive Damages

Although punitive damages are no longer available against municipalities, political subdivisions or those acting in their official capacities, punitive damages are available against individual defendants. Punitive damages are not, however, to be imposed as a matter of right. The award of punitive damages is within the sound discretion of the trier of facts,[9] and the trial court cannot be required to make an award of punitive damages.[10] The award of punitive damages must be imposed on the basis of the conduct and responsibility of individuals for the wrongdoing and not the defendants collectively.[11] The amount of the punitive award must be based in part on the financial resources of the individual defendant.[12] Most courts follow the rule that actual damages must be awarded before punitive damages can be assessed,[13] although some have held that only nominal damages are required as a predicate for punitive damages.[14]

Smith v. Wade and the Standard for the Award of Punitive Damages

One of the major issues associated with punitive damages which was left unanswered after *City of Newport* was whether intent to violate the rights of others or malice was a prerequisite for the award of punitive damages. The Supreme Court rejected the intent or malice requirement in *Smith v. Wade*.[15] In *Smith v. Wade*, the Supreme Court reviewed the various standards for the imposition of punitive damages in the civil rights tort context. The Court determined that the availability of punitive damages was accepted as settled law by

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8. To assure that the absence of punitive damages is properly raised, it should first be plead as an affirmative defense in the answer or asserted in a Rule 12b motion to dismiss.

9. Block v. R. H. Macey & Co. Inc., 712 F.2d 1241, 1246 (8th Cir. 1983); Longoria v. Wilson, 730 F.2d 300, 305 (5th Cir. 1984); McFadden v. Sanchez, 710 F.2d 907 (2nd Cir. 1983), *cert. denied* 104 S. Ct. 393 (1983).

10. Merritt v. De Los Santos, 721 F.2d 598, 601 (7th Cir. 1983).

11. McFadden v. Sanchez, 710 F.2d 907 (2nd Cir. 1983), *cert. denied* 104 S. Ct. 393 (1983); Clements v. United States, 568 F. Supp. 1150, 1171 (E.D. Cal. 1983).

12. Vinyard v. King, 728 F.2d 428 (10th Cir. 1984); Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979), *cert. denied*, 445 U.S. 938 (1980).

13. Block v. R. H. Macey and Co. Inc., 712 F.2d 1241, 1246 (8th Cir. 1983); *In re* Selcraig, 705 F.2d 789, 797 (5th Cir. 1983).

14. Goodwin v. Circuit Court of St. Louis County, 729 F.2d 541 (8th Cir. 1984), *cert. denied* 105 S. Ct. 112. *See*, note 24, *infra*.

15. 103 S. Ct. 1625 (1983).

nearly all state and federal courts at the time of enactment of the civil rights acts.[16] Further, the Court noted that the common law rule did not require a showing of actual malicious intent but permitted punitive award on varying standards of negligence, gross negligence, recklessness, or other culpable conduct short of actual malicious intent.[17] The Supreme Court found that neither the policies nor the purposes of section 1983 require a departure from this common law rule, thus a jury may be permitted to impose punitive damages in a section 1983 action when "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.[18]

The Court also noted that the threshold standard for allowing punitive damages applies in a section 1983 case even though the underlying standard of liability for compensatory damages is also one of recklessness. In *Smith v. Wade,* the standard for the cause of action against Smith was "gross negligence" or "egregious failure to protect" the prisoner, Wade.[19] The Court explained that at common law the standards were equated and no reason exists to depart from that rule.[20]

Left untouched by *Smith v. Wade* is the stricter standard for the imposition of punitive damages in defamation cases where the Court stated that it did not want to inhibit the vigorous exercise of first amendment freedoms. In defamation cases, punitive damages cannot be assessed absent proof of "knowledge of falsity or reckless disregard for the truth."[21]

Lower Federal Court Interpretations of the Smith v. Wade Standard

Since *Smith v. Wade* has been handed down by the Supreme Court, numerous federal courts have addressed its applicability in civil rights cases. While numerous appellate courts have addressed *Smith v. Wade,* the decision most pertinent to the proper drafting of a punitive damage jury instruction is probably one rendered by the Seventh Circuit.

In *McKinley v. Trattles,*[22] the Seventh Circuit saw its task as

16. *Id.* at 1628-31.
17. *Id.* at 1634; *accord* Boussom v. City of Elkhart, 567 F. Supp. 1382, 1389 (N.D. Ind. 1983).
18. *Id.* at 1637 and 1640.
19. *Id.* at 1628 and 1638.
20. *Id.* at 1640.
21. *Id.* at 1637 *citing and quoting* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349, 94 S. Ct. 2997, 3011 (1974).
22. 732 F.2d 1320 (7th Cir. 1984).

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"requir[ing] us to apply the standards for awards of punitive damages in civil rights cases announced last year in *Smith v. Wade.*"[23] McKinley was a prisoner's rights case brought under section 1983 for a violation of the plaintiff's eighth amendment rights. The defendants in *McKinley* were prison officials who had performed a strip search upon the plaintiff in an unconstitutional manner. The Seventh Circuit affirmed the jury's award of $15,000 punitive damage subject to a remittitur reducing the award to an amount to be set at the discretion of the district court with a suggested guideline limitation of $6,000. It is important to note that this punitive damage award was affirmed without the jury awarding compensatory damages.[24]

The Court specially affirmed the district court's instructions to the jury on punitive damages holding that the instructions were "accurate and complete" and "comply with the Supreme Court's mandate in *Smith v. Wade.*"[25] The district court in *McKinley* had instructed the jury as follows:

> Punitive damages. Regardless of actual damages, the law permits the jury under certain circumstances to award the injured person punitive and exemplary damages in order to punish the wrongdoer for some violation of the constitutional rights or some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.
>
> If the jury should find from a preponderance of the evidence in the case that the act or omission of the defendants which proximately caused actual injury or damage to the plaintiff was maliciously or wantonly or oppressively done, then the jury may, if in the exercise of discretion they unanimously choose to do so, award such amount as the jury shall unanimously agree to be proper as punitive and exemplary damages.
>
> An act or a failure to act is maliciously done if prompted or accompanied by ill will or spite or grudge either toward the injured person individually or toward all persons in one or more groups or categories of which the injured person is a member.
>
> An act or a failure to act is wantonly done if done in reckless disregard or callous disregard of or indifference to the rights of one or more persons including the injured person.

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23. *Id.* at 1322.
24. *Id.* at 1326.
25. *Id.*

> An act or a failure to act is oppressively done if done in a way or manner which injures or damages or otherwise violates the rights of another person with unnecessary harshness or severity as by misuse, or abuse of authority, or power, or by taking advantages of some [weakness] or disability or misfortune of another person. [26]

The Seventh Circuit noted that under these instructions the jury could award punitive damages "only if [defendant] acted in reckless or callous disregard of [plaintiff's] rights, if [defendant's] actions were the result of spite or ill will or if the conduct was oppressive."[27] Furthermore, the court read these jury instructions as consistent with its prior decisions and *Smith v. Wade* which require "aggravating circumstances" and not mere negligence before punitive damages may be assessed. [28]

The courts of the Fifth Circuit have also had occasion to interpret jury instructions on punitive damages after *Smith v. Wade*. In *Longoria v. Wilson*,[29] the court was faced with determining whether a $15,000 punitive damage award was justified. *Longoria* involved a section 1983 claim against a police officer for using excessive force following arrest. The court reviewed the *Smith v. Wade* standard and specifically found that the district court had "instructed the jury in accordance with this standard."[30] The district court's instructions were as follows:

> [B]efore you can find punitive damages, you must find by a preponderance of the evidence that the officer not only acted in an illegal manner, but that he acted in a malicious and oppressive way, that his conduct was prompted by ill will or spite or grudge, and that he did this with extraordinary harshness or severity.[31]

The circuit court opinion does not reflect whether the district court defined the terms of this instruction. Nevertheless, the instruction was approved though not entirely tracking the *Smith v. Wade* language.

In an earlier Fifth Circuit opinion, the court approved a punitive damage instruction as "well within the boundaries of traditional tort standards for assessing punitive damages." [32] In *Stokes v. Del-*

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26. *Id.* at n.2.
27. *Id.*
28. *Id.*
29. 730 F.2d 300 (5th Cir. 1984).
30. *Id.* at 305.
31. *Id.* at n.9.
32. Stokes v. Delcambre, 710 F.2d 1120, 1126 (5th Cir. 1983).

cambre,[33] the district court had instructed the jury that if the act or omission "which proximately caused the injury or damage to the Plaintiff . . . was maliciously or wantonly or oppressively done, then you may . . . add to the award such amount as you shall unanimously agree to be proper as punitive damages."[34] Again, the Fifth Circuit approved a jury instruction not containing the "reckless disregard" or "callous indifference" language of *Smith v. Wade*. Moreover, in *In re Selcraig*,[35] the Fifth Circuit stated again, in dictum, that a civil rights plaintiff has a right to punitive damages "if he can show that [defendant] made the charges maliciously." Thus, although courts in the Fifth Circuit have allowed the jury to be instructed in a manner not in full compliance with the *Smith v. Wade* standard, it would seem that had the plaintiffs in the above cases insisted on the *Smith* standard that it would be error to fail to instruct the jury accordingly.[36]

Other circuits have affirmed punitive damage awards on varying standards ranging from mere willfulness to gross recklessness. In *Merritt v. De Los Santos*,[37] the Seventh Circuit upheld a magistrate's imposition of a punitive damage award for deprivation of procedural due process. The circuit court held that a prison official violated the inmate's right to an impartial decision when he remained as a member of the disciplinary committee over the inmate's objection.[38] In *Grimm v. Leinart*,[39] the Sixth Circuit held: "In order to comply with the *Smith* standard, the district court should instruct the jury that it may award punitive damages if it finds that the defendant willfully and intentionally deprived plaintiff of his federally protected rights *or* if the defendant engaged in conduct that exhibited a reckless or callous disregard of the plaintiffs' rights."[40]

In a decision from the First Circuit, the court held a state official liable for his failure to intervene and prevent a chemical test performed upon the inmate plaintiff, ruling that such omission constituted a reckless and callous indifference to plaintiff's safety.[41] Although the court did not discuss the district court's jury instruction

33. *Id.*
34. *Id.* at 1126.
35. 705 F.2d 789 (5th Cir. 1983).
36. Hart v. Walker, 720 F.2d 1436, 1442 (5th Cir. 1983) (Fifth Circuit approved the award of punitive damages in a section 1983 case under either the state standard of "malice, fraud, oppression, willful wrong, or gross negligence" or the federal standard enunciated in *Smith v. Wade.)*
37. 721 F.2d 598 (7th Cir. 1983).
38. *Id.* at 602.
39. 705 F.2d 179 (6th Cir. 1983).
40. *Id.* at 182.
41. Clark v. Taylor, 710 F.2d 4 (1st Cir. 1983).

that a defendant is not liable for merely negligent failure to act, it did hold that the facts evidenced a breach of the official's duty of care and thus constituted a reckless and callous indifference to the inmate's safety.[42]

In holding that the jury was improperly instructed in that punitive damages were not determined individually against each defendant, the Second Circuit in *McFadden v. Sanchez*[43] reversed the lower court's ruling and remanded for determination of individual liability as to damages. The circuit court provided in dicta what it considered an appropriate special verdict form, yet it did not discuss the substantive jury instructions on punitive damages except to the extent that punitive damages must be assessed individually.[44]

Possible Jury Interrogatory and Instruction

As is obvious from a review of these cases, the application of the *Smith v. Wade* standard seems to vary somewhat from circuit to circuit. At the risk of suggesting a national standard change, it appears that a post-*Smith v. Wade* jury interrogatory and instruction might be worded similarly to this one:

> What amount of money, if any, do you assess against the individual defendants as punitive damages, if any?
>
> Consider each defendant separately, and with respect to each defendant, consider both the liability and the amount individually for each defendant based upon that defendant's financial capacity to pay any award of punitive damages.
>
> You may consider an assessment of punitive damages only if you find by a preponderance of the evidence that the particular defendant's action proximately caused actual injury to the plaintiff and that the individual defendant not only acted in an illegal manner, but also that he acted in a malicious, wanton and oppressive way, that his conduct was prompted by ill will or spite or grudge and that he did this with extraordinary harshness or severity.

Even though the standard for punitive damages was set by *Smith v. Wade*, the opinion itself left leeway for adaptation by the lower courts. Without doubt the substantive tort laws of the states will

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42. *Id.* at 10.
43. 710 F.2d 907 (2nd Cir. 1983).
44. *Id.* at 914 and 914 n.6.

influence the application of the *Smith v. Wade* standard in each circuit. Should the application become significantly different and conflicting some future supreme court might feel compelled to examine the subject again.